

35A Am. Jur. 2d Fish, Game, and Wildlife Conservation II A Refs.

American Jurisprudence, Second Edition | May 2021 Update

Fish, Game, and Wildlife Conservation

Karl Oakes, J.D.

II. Hunting and Fishing Rights

A. Overview

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Research References

West's Key Number Digest

West's Key Number Digest, [Fish](#) 🔑 3, 5(.5) to 5(2)

West's Key Number Digest, [Game](#) 🔑 2.5, 3

West's Key Number Digest, [Water Law](#) 🔑 1242

A.L.R. Library

A.L.R. Index, Fish and Game

West's A.L.R. Digest, [Fish](#) 🔑 3, 5(.5) to 5(2)

West's A.L.R. Digest, [Game](#) 🔑 2.5, 3

West's A.L.R. Digest, Water Law 🔑 1242

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II. Hunting and Fishing Rights

A. Overview

1. In Public Lands and Waters

a. In General


§ 8. Hunting and fishing rights in public lands and waters, generally

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West's Key Number Digest

West's Key Number Digest, [Fish](#)  3, 5(.5) to 5(2)

West's Key Number Digest, [Game](#)  2.5, 3

West's Key Number Digest, [Water Law](#)  1242

The right of an individual to take fish and game is a qualified one in that it is a privilege granted by the state,¹ and may be taken away or limited as the state sees fit.² Thus, the right to take fish or game is subject to such conditions and limitations as the state legislature may, within constitutional limits, impose.³ Furthermore, recreational hunting is not a fundamental right and regulations affecting the right to hunt do not impair fundamental constitutional rights.⁴

An artificial change in a river and its bed will not affect the public nature of the waters and will not take away the right of the public to use them for fishing.⁵

Public rights such as the right of navigation on the waters of a stream or lake, whether the bed is privately or publicly owned, and the similar right of fishing and hunting over navigable waters, sometimes restricted to water publicly owned, are public easements.⁶

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Footnotes

¹ State ex rel. Visser v. State Fish and Game Commission, 150 Mont. 525, 437 P.2d 373 (1968); Unified Sportsmen of Pennsylvania ex rel. their Members v. Pennsylvania Game Commission (PGC), 18 A.3d 373 (Pa. Commw. Ct. 2011) (right to hunt game).
As to ownership of fish game residing in the state or the people, not individuals, until reduced to possession, see § 3.

- ² [State ex rel. Visser v. State Fish and Game Commission](#), 150 Mont. 525, 437 P.2d 373 (1968).
- ³ [Aikens v. Conservation Dept.](#), 28 Mich. App. 181, 184 N.W.2d 222 (1970), judgment rev'd on other grounds, 387 Mich. 495, 198 N.W.2d 304 (1972).
- ⁴ [Christy v. Hodel](#), 857 F.2d 1324 (9th Cir. 1988); [U.S. v. Romano](#), 929 F. Supp. 502 (D. Mass. 1996).
Nonresident landowners do not have a right to hunt wildlife on their land that is sufficiently fundamental to trigger the protections of the Privileges and Immunities Clause of Federal Constitution with respect to a statute distinguishing between resident and nonresident landowners for the purposes of granting special hunting privileges; the legislature extinguished any common-law right to hunt on one's own land through an extensive statutory scheme concerning wildlife within the state borders and regulating the manner, places, and times in which certain species of wildlife may be taken and in what numbers. [Democko v. Iowa Dept. of Natural Resources](#), 840 N.W.2d 281 (Iowa 2013).
- ⁵ [Port Acres Sportsman's Club v. Mann](#), 541 S.W.2d 847 (Tex. Civ. App. Beaumont 1976), writ refused n.r.e.
- ⁶ [Delmarva Power & Light Co. of Md. v. Eberhard](#), 247 Md. 273, 230 A.2d 644 (1967).

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II. Hunting and Fishing Rights

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1. In Public Lands and Waters

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§ 9. Right to hunt and trap from boats

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West's Key Number Digest

West's Key Number Digest, [Fish](#)  3, 5(.5) to 5(2)

West's Key Number Digest, [Game](#)  2.5, 3

The right to hunt and trap from boats on rivers, lakes, streams, and the like, is analogous to the right to take fish from the water. As a general rule, the test as to the public right of fowling, hunting, and trapping is the public or private ownership of the soil beneath the waters.¹ Where the state owns the soil beneath waters, the public has a right to resort to such public waters and hunt or trap.² The public has a right to row a boat upon navigable waters the soil under which is owned by the state, but which flows through private property, and to shoot and trap, so long as it does not trespass upon the adjacent property.³

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- ¹ [State ex rel. State Game Commission v. Red River Valley Co.](#), 1945-NMSC-034, 51 N.M. 207, 182 P.2d 421 (1945).
- ² [Meredith v. Triple Island Gunning Club](#), 113 Va. 80, 73 S.E. 721 (1912).
- ³ [Bolsa Land Co. v. Burdick](#), 151 Cal. 254, 90 P. 532 (1907).

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II. Hunting and Fishing Rights

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1. In Public Lands and Waters

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§ 10. Right to fish or hunt distinguished from ownership of fish or game

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West's Key Number Digest

West's Key Number Digest, [Fish](#)  3, 5(.5) to 5(2)

West's Key Number Digest, [Game](#)  2.5, 3

The right to hunt or fish is separate from the right to the game or the fish,¹ thus individuals have no property right in fish or game until they are lawfully reduced to possession,² ownership of wild animals remaining in the state except as the state chooses to allow them to be taken.³ The pursuit of game does not effect a change in the right of ownership until the game is actually taken. Thus, the hunter's right to pursue does not become a right of ownership until the hunter has mortally wounded the animal or has it in such a situation that its escape is improbable, if not impossible.⁴

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Footnotes

¹ [Tlingit and Haida Indians of Alaska v. U. S.](#), 182 Ct. Cl. 130, 389 F.2d 778 (1968).
As to ownership or property rights in fish and game, see [§ 1](#).

² [§ 3](#).

³ [State ex rel. Visser v. State Fish and Game Commission](#), 150 Mont. 525, 437 P.2d 373 (1968).
The ownership of fish and game, so far as they are capable of ownership, until reduced to actual possession, is in the state, and their protection and preservation by the state has always been regarded and treated as within the proper domain of its police power. [Madison Street Fishery, LLC v. Zehringer](#), 2017-Ohio-992, 86 N.E.3d 914 (Ohio Ct. App. 6th Dist. Erie County 2017).
As to regulation of hunting and fishing, see [§§ 30 to 34](#).

⁴ [Dapson v. Daly](#), 257 Mass. 195, 153 N.E. 454, 49 A.L.R. 1496 (1926).

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II. Hunting and Fishing Rights

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1. In Public Lands and Waters

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§ 11. Interference with right to hunt and fish; priority of right

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West's Key Number Digest

West's Key Number Digest, [Fish](#)  3, 5(.5) to 5(2)

West's Key Number Digest, [Game](#)  2.5, 3

States may protect the public's right to hunt and the lawful taking of wildlife by limiting harassment of hunters by animal rights activists or others seeking to physically interfere with lawful hunting.¹ The title to public trust waters is held in trust for the people of the state, so that they may enjoy navigation of waters, carry on commerce over them, and have liberty of fishing therein, freed from obstruction or interference of private parties.² State law may also protect the public's right to enter commercial forestlands to exercise the privilege of hunting or fishing without interference.³ Statutes prohibiting interference with hunting, fishing, and predator control must otherwise satisfy constitutional requirements such that they must not be unconstitutionally overbroad or prohibit protected speech. Thus, where a statute proscribes interference but does not require physical interference it may not pass constitutional muster.⁴

However, as between fishermen, there is no priority of rights to fish in a particular area and each fisherman owes the other a duty of care.⁵ The public right to fish in navigable waters of the state is common to all of its citizens, and even a riparian owner has no right to fish in navigable waters superior to that of any other citizen, in the absence of express grant or prescriptive right.⁶ The right to fish in navigable waters of the state necessarily includes the right to anchor temporarily and to wade but that does not include a right to walk upon banks of the river or to tie a boat or line to an object upon the shore to facilitate fishing in those waters,⁷ and similarly, the right to fish in navigable waters does not carry with it a right to trespass upon the land of the riparian owner.⁸ However, it has been held that the mooring of three boats by a defendant on his privately held tidal flats was not such exercise of his rights to use the land as to constitute interference with the public's reasonable use of the area for shellfishing.⁹

The members of the public have standing to complain of unauthorized and unreasonable uses or methods of diversion of water which interfere with the right to fish.¹⁰

§ 11. Interference with right to hunt and fish; priority of right, 35A Am. Jur. 2d Fish,...

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- ¹ Binkowski v. State, 322 N.J. Super. 359, 731 A.2d 64 (App. Div. 1999).
- ² RJR Technical Co. v. Pratt, 339 N.C. 588, 453 S.E.2d 147 (1995).
- ³ Goodall v. Whitefish Hunting Club, 208 Mich. App. 642, 528 N.W.2d 221 (1995).
- ⁴ State v. Casey, 125 Idaho 856, 876 P.2d 138 (1994).
- ⁵ CEH, Inc. v. F/V Seafarer (O.N. 675048), 880 F. Supp. 940 (D.R.I. 1995), *aff'd*, 70 F.3d 694 (1st Cir. 1995); Dycus v. Sillers, 557 So. 2d 486 (Miss. 1990).
- ⁶ People v. Dunn, 159 Misc. 2d 536, 610 N.Y.S.2d 121 (App. Term 1993).
- ⁷ Douglaston Manor, Inc. v. Bahrakis, 218 A.D.2d 300, 639 N.Y.S.2d 613 (4th Dep't 1996), *order rev'd on other grounds*, 89 N.Y.2d 472, 655 N.Y.S.2d 745, 678 N.E.2d 201 (1997).
- ⁸ Michigan United Conservation Clubs v. Board of Trustees of Michigan State University, 172 Mich. App. 189, 431 N.W.2d 217, 50 Ed. Law Rep. 161 (1988).
- ⁹ Town of Wellfleet v. Glaze, 403 Mass. 79, 525 N.E.2d 1298 (1988).
- ¹⁰ Golden Feather Community Assn. v. Thermalito Irrigation Dist., 209 Cal. App. 3d 1276, 257 Cal. Rptr. 836 (3d Dist. 1989).
As to injury to hunting and fishing rights, generally, see §§ 24 to 26.

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§ 12. Acquisition of exclusive right to fish by grant

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West's Key Number Digest, [Fish](#)  3, 5(.5) to 5(2)

The right of ownership of the soil and the right of fishing in the waters thereover are not necessarily coextensive. Where the state owns the soil under navigable waters, it may convey merely the soil without an exclusive right of fishery; in such a case, the grantee takes the soil subject to the piscatory rights of the public.¹ A grant of the soil will ordinarily not be construed to convey the fishing rights unless the intention to do so is so clearly and fully expressed that the grant is incapable of any other reasonable construction.²

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¹ [State v. Leavitt](#), 105 Me. 76, 72 A. 875 (1909); [Hume v. Rogue River Packing Co.](#), 51 Or. 237, 92 P. 1065 (1907).

² [Carter v. Territory of Hawaii](#), 200 U.S. 255, 26 S. Ct. 248, 50 L. Ed. 470 (1906); [Hume v. Rogue River Packing Co.](#), 51 Or. 237, 92 P. 1065 (1907).

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§ 13. Acquisition of exclusive right to fish by prescription

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West's Key Number Digest, [Fish](#)  3, 5(.5) to 5(2)

The public has an important interest in areas which have been traditionally used by the public for fishing and recreational activities for more than a century.¹ However, since the theory of prescriptive rights presumes the existence of a grant which has become lost through lapse of time,² if the right could not have been procured by grant, a grant cannot be presumed, and use will confer no exclusive rights.³ Absent the right of the state to grant an exclusive fishery, such a fishery cannot be acquired by prescription, for the exercise of the right of fishing in public waters cannot be exclusive. Its exercise, no matter by whom or for what length of time, is only the lawful exercise of a public right.⁴ The fact that a shore owner has the exclusive right to fish to the middle of a navigable stream opposite his or her land is unavailable as a means of acquiring an exclusive fishery within the limits prescribed although he or she has cleared out a fishing place in the bed of the stream.⁵

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¹ [Smith v. State](#), 153 A.D.2d 737, 545 N.Y.S.2d 203 (2d Dep't 1989).

² [Hume v. Rogue River Packing Co.](#), 51 Or. 237, 92 P. 1065 (1907).

³ [Slingerland v. International Contracting Co.](#), 169 N.Y. 60, 61 N.E. 995 (1901).

⁴ [Hume v. Rogue River Packing Co.](#), 51 Or. 237, 92 P. 1065 (1907).

⁵ [Hume v. Rogue River Packing Co.](#), 51 Or. 237, 92 P. 1065 (1907).

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II. Hunting and Fishing Rights

A. Overview


1. In Public Lands and Waters

b. Particular Locations

§ 14. Rights to fish in navigable waters

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West's Key Number Digest

West's Key Number Digest, [Fish](#)  3, 5(.5) to 5(2)

The public has a prima facie right to fish in all navigable streams, just as it has in other public waters, even though the beds thereof may be owned by the riparian owners.¹ The term “navigable waters” in a statute providing that people have the right to catch fish in any of the navigable waters of the state includes those waters which are suitable for public recreational use.²

With respect to the grant of a fee interest in the lands under navigable waters, the public right of navigation and fishery supersedes the private right.³ A plaintiff, although owning land to the center of a navigable river, and owning both sides and the entire soil underwater, did not, as the riparian owner, own the water or the fish in the water. Thus, the general public who might have had access to the river without trespassing on the upland of plaintiff could fish the river.⁴ Furthermore, a riparian owner, merely as such, has no exclusive right to a fishery in tidal or navigable waters.⁵ Hence, a stranger has a right to row a boat upon navigable streams flowing through private property and to take fish from the water,⁶ provided he or she does not trespass on the adjacent property.⁷ A right to fish in navigable waters does not carry with it the right to trespass upon the land of a riparian owner.⁸ A person who legally accesses a watercourse, and fishes from within a boat on the watercourse, cannot be convicted of violating a statute prohibiting fishing on private property without the consent of the owner, as the public has an easement in the use of the waterway. Thus, the person has a constitutional and statutory right to be there.⁹

However, the public easement of navigation does not of itself sustain a common right of fishing in the waters.¹⁰ Accordingly, the improvement of a river so as to change it from the nonnavigable to the navigable class of waters does not necessarily give the public a common right of fishery in the water, even though such a change may afford the public an easement of navigation along the stream.¹¹

Where lands have, as the result of an avulsion, become submerged to a depth satisfying the requirements of navigability, the owner does not lose title to the submerged lands then constituting part of the stream bed and has the right to drain off the water and reclaim the land at any time, but in the absence of such reclamation the public has the right to fish in these waters,

because of their acquired navigable character, without let or license from the owner.¹²

Where flooding may physically allow navigation of a stream not otherwise navigable except during periods of flooding, individual members of the public have no right to fish in it or navigate it during times of flooding absent permission from the landowners.¹³

Observation:

The statutory right of the public to fish in a reservoir does not take precedence over public purposes which are incompatible with fishing.¹⁴

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Footnotes

- ¹ [Diversion Lake Club v. Heath](#), 126 Tex. 129, 86 S.W.2d 441 (1935).
- ² [Kelley ex rel. MacMullan v. Hallden](#), 51 Mich. App. 176, 214 N.W.2d 856 (1974).
As to definition of navigable waters and criteria for determining what waters are navigable, see [Am. Jur. 2d, Waters §§ 135 to 150](#).
- ³ [Smith v. State](#), 153 A.D.2d 737, 545 N.Y.S.2d 203 (2d Dep't 1989).
- ⁴ [NeBoShone Ass'n v. State Tax Commission](#), 58 Mich. App. 324, 227 N.W.2d 358 (1975).
- ⁵ [NeBoShone Ass'n v. State Tax Commission](#), 58 Mich. App. 324, 227 N.W.2d 358 (1975).
- ⁶ [Lehigh Falls Fishing Club v. Andrejewski](#), 1999 PA Super 184, 735 A.2d 718 (1999).
- ⁷ [NeBoShone Ass'n v. State Tax Commission](#), 58 Mich. App. 324, 227 N.W.2d 358 (1975); [State ex rel. State Game Commission v. Red River Valley Co.](#), 1945-NMSC-034, 51 N.M. 207, 182 P.2d 421 (1945).
- ⁸ [Michigan United Conservation Clubs v. Board of Trustees of Michigan State University](#), 172 Mich. App. 189, 431 N.W.2d 217, 50 Ed. Law Rep. 161 (1988).
- ⁹ [State v. Head](#), 330 S.C. 79, 498 S.E.2d 389 (Ct. App. 1997).
- ¹⁰ [Schulte v. Warren](#), 218 Ill. 108, 75 N.E. 783 (1905).
- ¹¹ [Schulte v. Warren](#), 218 Ill. 108, 75 N.E. 783 (1905).
- ¹² [Bohn v. Albertson](#), 107 Cal. App. 2d 738, 238 P.2d 128 (1st Dist. 1951).
- ¹³ [Gollatte v. Harrell](#), 731 F. Supp. 453 (S.D. Ala. 1989).
- ¹⁴ [Golden Feather Community Assn. v. Thermalito Irrigation Dist.](#), 209 Cal. App. 3d 1276, 257 Cal. Rptr. 836 (3d Dist. 1989).

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II. Hunting and Fishing Rights

A. Overview


1. In Public Lands and Waters

b. Particular Locations

§ 15. Rights to hunt and fish in navigable waters—Fisheries

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West's Key Number Digest, [Fish](#)  3, 5(.5) to 5(2)

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[Public rights of recreational boating, fishing, wading, or the like in inland stream the bed of which is privately owned, 6 A.L.R.4th 1030](#)

Generally the term “fishery” denotes a place for fishing. In a legal sense, however, it has a broader significance and may be defined as the right to employ, within a particular stretch of water, lawful means for the taking of fish which may be found there. It is to be distinguished from a fishing place or the right to use a particular shore or beach as the basis for carrying on the business; the latter is vested in the shore owner and is entirely distinct from the right to take fish from the water.¹

The states hold interests in a fishery for the benefit of the public.² The people have a right to take fish from salt waters subject to regulations imposed by a state.³ Thus, in the absence of any prescriptive right, or any grant or regulation by the state, there exists in the general public a common right to fish in all the arms of the sea and other public waters of the state,⁴ and the public has a traditional right to fish from boats in navigable waters of the state.⁵ Riparian owners along a navigable water, merely as such, have no prior or exclusive rights of fishing in such water.⁶

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- ¹ Hume v. Rogue River Packing Co., 51 Or. 237, 92 P. 1065 (1907).
- ² Com. v. Tart, 408 Mass. 249, 557 N.E.2d 1123 (1990).
- ³ State v. Perkins, 436 So. 2d 150 (Fla. 2d DCA 1983).
- ⁴ Douglaston Manor, Inc. v. Bahrakis, 89 N.Y.2d 472, 655 N.Y.S.2d 745, 678 N.E.2d 201 (1997); RJR Technical Co. v. Pratt, 339 N.C. 588, 453 S.E.2d 147 (1995).
- ⁵ State v. Barras, 615 So. 2d 285 (La. 1993).
- ⁶ § 21.

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1. In Public Lands and Waters

b. Particular Locations

§ 16. Use of shore to fish

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West's Key Number Digest

West's Key Number Digest, [Fish](#)  3, 5(.5) to 5(2)

The fact that all the members of the public have a common right of fishing in waters in front of an owner's premises gives them no right to trespass on his or her lands,¹ and as to that part of the shore which is above the high watermark, the right of the owner is exclusive.² Thus, while the public has a right to fish in navigable waters, that right may not go so far as to divest owners of adjacent banks of their exclusive rights to fisheries therein.³ Also, a general member of the public, as such, has no right to construct a fish trap so as to interfere with the rights of a riparian owner to seine for fish in such waters and to interfere with access to his or her property.⁴

The general public, having fishing rights in tidewaters, may use the soil between the high and low watermarks for the purpose of landing nets and for other uses in aid of the fishing rights.⁵ However, a person owning an upland island and the tidelands in front of that land within navigable waters may enjoin the construction of a "pound net" in front of the land for this would seriously impair the owner's right as a member of the public to seine for fish there, as well as the owner's exclusive right to draw the owner's seine upon the shores of the premises.⁶

The ownership of land along the banks of navigable rivers does not give the owner the exclusive right to fish in those rivers; that right is vested in the state and open to the public.⁷

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¹ [Michigan United Conservation Clubs v. Board of Trustees of Michigan State University](#), 172 Mich. App. 189, 431 N.W.2d 217, 50 Ed. Law Rep. 161 (1988).

- ² Hume v. Rogue River Packing Co., 51 Or. 237, 92 P. 1065 (1907).
- ³ Douglaston Manor, Inc. v. Bahrakis, 89 N.Y.2d 472, 655 N.Y.S.2d 745, 678 N.E.2d 201 (1997).
- ⁴ Johnson v. Jeldness, 85 Or. 657, 167 P. 798 (1917).
- ⁵ Pacific Steam Whaling Co. v. Alaska Packers' Ass'n, 138 Cal. 632, 72 P. 161 (1903).
- ⁶ Johnson v. Jeldness, 85 Or. 657, 167 P. 798 (1917).
- ⁷ Lehigh Falls Fishing Club v. Andrejewski, 1999 PA Super 184, 735 A.2d 718 (1999).

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§ 17. Rights to fish in coastal waters

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West's Key Number Digest

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The maritime belt is that part of the sea which, in contradistinction to the open sea, is under the sway of the riparian states which can exclusively reserve the fishery within their respective maritime belts for their own citizens, whether for fish, pearls, amber, or other products of the sea.¹ Generally, the United States government has exclusive jurisdiction over the management of fishing rights beyond state boundaries which are limited to a three mile belt off the mainland shore; coastal channels and straits beyond the three mile belts off the mainland shores are outside the state boundaries and the states cannot regulate or limit fishing rights in those waters.² However, if a state's statutes purport to prescribe fishing activities in areas beyond its boundaries, persons whose conduct occurs within the state's territorial jurisdictional do not have standing to challenge the constitutionality and validity of the statute based on its purported prescription beyond its jurisdiction.³

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¹ [State of Louisiana v. State of Mississippi](#), 202 U.S. 1, 26 S. Ct. 408, 50 L. Ed. 913 (1906).

² [People v. Weeren](#), 26 Cal. 3d 654, 163 Cal. Rptr. 255, 607 P.2d 1279 (1980).

³ [State v. Hill](#), 372 So. 2d 84 (Fla. 1979).
As to regulation of hunting and fishing, see §§ 30 to 34.

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§ 18. Rights to fish in lakes and ponds

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West's Key Number Digest

West's Key Number Digest, [Fish](#)  3, 5(.5) to 5(2)

Although the owners of property surrounding small lakes and ponds control fishing rights in those waters, generally, and thus such waters are effectively closed to public fishing,¹ the public has a common right of fishery in larger lakes that are navigable in fact² as, for example, the Great Lakes³ and the bays extending therefrom.⁴ Indeed, the public has a right to fish in the waters of a navigable lake which has been stocked with fish by the state.⁵

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Footnotes

¹ § 21.

² [Conant v. Jordan](#), 107 Me. 227, 77 A. 938 (1910); [Winous Point Shooting Club v. Slaughterbeck](#), 96 Ohio St. 139, 117 N.E. 162 (1917).

³ [Winous Point Shooting Club v. Slaughterbeck](#), 96 Ohio St. 139, 117 N.E. 162 (1917) (the right of the public to fish in the waters of Lake Erie and its bays is as fixed and complete as if those waters were subject to the ebb and flow of the tide).

⁴ [Winous Point Shooting Club v. Slaughterbeck](#), 96 Ohio St. 139, 117 N.E. 162 (1917).

⁵ [Douglas v. Bergland](#), 216 Mich. 380, 185 N.W. 819, 20 A.L.R. 197 (1921).

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35A Am. Jur. 2d Fish, Game, and Wildlife Conservation § 19

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Fish, Game, and Wildlife Conservation
Karl Oakes, J.D.

II. Hunting and Fishing Rights

A. Overview


1. In Public Lands and Waters

b. Particular Locations

§ 19. Right to take shellfish

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fish](#)  3, 5(.5) to 5(2)

Generally title to shellfish in tidal waters is that of the state as representative of the people,¹ exercising not only rights of sovereignty but also property.² The public trust doctrine, under which the public retains an incidental right of fishing in navigable waterways, does not encompass the right to gather clams on private property.³

Although the state holds title to lands under navigable waters in public trust for the use and benefit of all its citizens, a state may permit the exclusive use of such lands by private individuals, that is, a franchise, for specific purposes, such as shellfishing.⁴ Thus, a state may convey an exclusive right to harvest all shellfish on leased underwater land whether the shellfish be naturally grown or cultivated.⁵

In some coastal states, statutes have been passed permitting riparian owners along the sea to use exclusively certain areas of the waters for the cultivation of oysters.⁶ Such statutes are generally valid, and the owners of oysters planted pursuant thereto will be protected in their ownership.⁷ However, the privilege of locating oyster beds on public lands and of planting and taking oysters therefrom is merely a license revocable by the legislature.⁸ It is also subject to the public's rights of navigation,⁹ and if it interferes therewith, the oysters or clams may be removed as a nuisance.¹⁰

While some states are forbidden by their constitutions to lease natural shellfish beds,¹¹ in most jurisdictions the state is permitted to convey or lease clam or oyster beds to private individuals.¹² The grantee or lessee may acquire an exclusive right to plant and cultivate shellfish on the bed,¹³ and others may be enjoined from interfering with such a bed.¹⁴ Generally the leasing of water bottoms for oyster cultivation and renewal of those leases is discretionary with the appropriate state agency, it being for the agency to make a determination that those water bottoms are suitable for oyster cultivation.¹⁵ While a shellfish lease, granting a lessee the absolute right to use and occupy grounds for the purpose of planting, growing, storing and harvesting clams, grants the particular lessee the exclusive right to take clams from the beds, excluding all others from such activity on the grounds, the lessee does not take fee simple title, nor can the lessee use the property for any other purpose

except that provided by the lease consistent with and pursuant to the statutory authority therefor; thus every other right generally belonging to the public is preserved.¹⁶

Observation:

The harvesting of live oysters was not a “mineral right” as defined by the mineral code which applied to the right to remove oyster shells. Thus, oyster leases were not subject to public bid. Although the shells were taken when the oysters were harvested, it was not pursuant to exercise of a mineral right and it was not the equivalent of shell dredging.¹⁷

A municipality is a “firm or corporation” that is eligible to receive transfers of oyster-planting ground leases under a state statute.¹⁸ However, shellfishing grounds are not owned by a municipality in the absence of a granting of private rights, even if the legislature enables a municipality to lease or license shellfishing grounds located within its borders.¹⁹

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Footnotes

- ¹ Shoreline Shellfish, LLC v. Town of Branford, 2020 WL 4354902 (Conn. 2020); State v. Norton, 335 A.2d 607 (Me. 1975).
- ² State v. Norton, 335 A.2d 607 (Me. 1975).
- ³ State v. Longshore, 97 Wash. App. 144, 982 P.2d 1191 (Div. 2 1999), aff’d, 141 Wash. 2d 414, 5 P.3d 1256 (2000).
- ⁴ Bryant v. Hogarth, 127 N.C. App. 79, 488 S.E.2d 269 (1997).
- ⁵ Murphy v. Long Island Oyster Farms, Inc., 112 A.D.2d 276, 491 N.Y.S.2d 721 (2d Dep’t 1985).
As to leases granting right to take shellfish, see § 25.
- ⁶ Windsor v. State, 103 Md. 611, 64 A. 288 (1906); Newport News Shipbuilding & Dry Dock Co. v. Jones, 105 Va. 503, 54 S.E. 314 (1906).
- ⁷ Cain v. Simonson, 39 So. 571 (Ala. 1905).
- ⁸ Payne & Butler v. Providence Gas Co., 31 R.I. 295, 77 A. 145 (1910).
- ⁹ Richardson v. U.S., 100 F. 714 (C.C.E.D. Va. 1900).
- ¹⁰ Payne & Butler v. Providence Gas Co., 31 R.I. 295, 77 A. 145 (1910).
- ¹¹ Commonwealth v. City of Newport News, 158 Va. 521, 164 S.E. 689 (1932).
- ¹² Jurisich v. Hopson Marine Service Co., Inc., 619 So. 2d 1111 (La. Ct. App. 4th Cir. 1993); Payne & Butler v. Providence Gas Co., 31 R.I. 295, 77 A. 145 (1910).
- ¹³ Murphy v. Long Island Oyster Farms, Inc., 112 A.D.2d 276, 491 N.Y.S.2d 721 (2d Dep’t 1985).
- ¹⁴ Working Waterman’s Ass’n of Virginia, Inc. v. Seafood Harvesters, Inc., 227 Va. 101, 314 S.E.2d 159 (1984).
- ¹⁵ Vujnovich v. Louisiana Wildlife and Fisheries Commission, 376 So. 2d 330 (La. Ct. App. 4th Cir. 1979).
- ¹⁶ Working Waterman’s Ass’n of Virginia, Inc. v. Seafood Harvesters, Inc., 227 Va. 101, 314 S.E.2d 159 (1984).

¹⁷ [Jurisich v. Hopson Marine Service Co., Inc.](#), 619 So. 2d 1111 (La. Ct. App. 4th Cir. 1993).

¹⁸ [City of Virginia Beach v. Virginia Marine Resources Commission](#), 70 Va. App. 68, 824 S.E.2d 506 (2019).

¹⁹ [Shoreline Shellfish, LLC v. Town of Branford](#), 2020 WL 4354902 (Conn. 2020).

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35A Am. Jur. 2d Fish, Game, and Wildlife Conservation § 20

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Fish, Game, and Wildlife Conservation
Karl Oakes, J.D.

II. Hunting and Fishing Rights


A. Overview

2. In or on Private Lands and Waters

§ 20. Hunting and fishing rights in or on private lands and waters, generally; rights of landowners

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fish](#)  3, 5(.5) to 5(2)

West's Key Number Digest, [Game](#)  2.5, 3

A.L.R. Library

[Public rights of recreational boating, fishing, wading, or the like in inland stream the bed of which is privately owned, 6 A.L.R.4th 1030](#)

In private waters subject to the state's right of regulation¹ the exclusive rights of fishing, as well as the right to hunt or trap, belong to the owners of the soil beneath the waters.² The fact that the owner of a nonnavigable body of water renders it navigable does not cause the owner to lose any of the owner's exclusive rights,³ although generally the public has a right to fish and hunt on navigable waters as an incident of the right to use the waters for the purposes of navigation, regardless of the ownership of the subaqueous soil.⁴ Sound public policy requires that the state continue to hold its navigable waters in trust for the public, and that such trust extend to the uses of such waters for fishing, hunting, and other recreational purposes, as well as for pure navigation.⁵

Every landowner has an exclusive common-law right to kill or capture game on his or her own land, subject to the regulatory action of the state in the preservation of all game for the common use.⁶ This right is regarded at common law as property *ratione soli*, or property by reason of the ownership of the soil.⁷ A hunter may hunt on his or her own premises even though the supply of game on the neighbor's lands is thereby lessened.⁸

The trespass of a hunter in pursuit of game on another's premises may be made a crime,⁹ and although the hunter may have

been standing in a place where there was a legal right to be, the hunter has no right to shoot over the premises of an adjoining owner or to go onto the premises of another to get game which has fallen there,¹⁰ unless the owner gives the hunter permission to do so.¹¹ State statutes may, however, allow entry into agricultural land not posted “no trespassing” for the purpose of retrieving wounded game.¹² The term “owner of land,” within statutes penalizing hunting over property without the consent of the owner, embraces a natural person, a corporation, or a quasi person or entity such as a partnership, and includes one who owns an undivided fractional interest in land, one who is in possession under a parol contract of purchase, and, under some statutes, one who owns the rights over lands.¹³

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Footnotes

- ¹ § 40.
- ² *State v. Taylor*, 358 Mo. 279, 214 S.W.2d 34 (1948); *State ex rel. State Game Commission v. Red River Valley Co.*, 1945-NMSC-034, 51 N.M. 207, 182 P.2d 421 (1945).
As to ownership and control of natural bodies of water, generally, see *Am. Jur. 2d, Waters* §§ 121 to 129.
- ³ *Clement v. Watson*, 63 Fla. 109, 58 So. 25 (1912).
- ⁴ *Douglaston Manor, Inc. v. Bahrakis*, 89 N.Y.2d 472, 655 N.Y.S.2d 745, 678 N.E.2d 201 (1997).
As to fishing rights on navigable waters, generally, see § 14.
- ⁵ *Muench v. Public Service Commission*, 261 Wis. 492, 55 N.W.2d 40 (1952).
- ⁶ *McKee v. Gratz*, 260 U.S. 127, 43 S. Ct. 16, 67 L. Ed. 167 (1922); *Hanson v. Fergus Falls Nat. Bank*, 242 Minn. 498, 65 N.W.2d 857, 49 A.L.R.2d 1379 (1954).
- ⁷ *Schulte v. Warren*, 218 Ill. 108, 75 N.E. 783 (1905).
- ⁸ *Meredith v. Triple Island Gunning Club*, 113 Va. 80, 73 S.E. 721 (1912).
- ⁹ *State v. McGregor*, 2017 MT 156, 388 Mont. 63, 398 P.3d 241 (2017).
- ¹⁰ *Herrin v. Sutherland*, 74 Mont. 587, 241 P. 328, 42 A.L.R. 937 (1925).
- ¹¹ *Gray v. Berg*, 2016 ND 82, 878 N.W.2d 79 (N.D. 2016).
- ¹² *State v. Corbin*, 343 N.W.2d 874, 41 A.L.R.4th 800 (Minn. Ct. App. 1984).
- ¹³ *Hawthorne v. State*, 43 Ga. App. 86, 158 S.E. 66 (1931).

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35A Am. Jur. 2d Fish, Game, and Wildlife Conservation § 21

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II. Hunting and Fishing Rights

A. Overview

2. In or on Private Lands and Waters

§ 21. Right of fishery of riparian owners

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fish & Wildlife § 3, 5\(.5\) to 5\(2\)](#)

West's Key Number Digest, [Water Law § 1242](#)

Fishing rights generally belong to the riparian owners,¹ subject to regulation by the state,² and subject to the right of the public to fish and hunt on navigable waters.³ Thus, the public may fish navigable streams flowing through private property,⁴ whereas the riparian owner does not have an exclusive right to the fishery, recognizing however that the right to fish in navigable waters does not carry with it the right to trespass upon the land of a riparian owner.⁵

Each riparian owner along a nonnavigable stream, whose title carries to the center of the stream, has the right to an exclusive fishery on his or her own side, extending to the center of the stream;⁶ and so far as he or she owns the land on both sides of the stream, the owner has the sole privilege of fishing in that portion of the stream within his or her lands.⁷ Even if a private stream is stocked by the state and gives rise to a colorable claim that the public is thus given a license to catch the fish from the stream, that gives members of the public no right to pass over the riparian owner's premises to get to the stream.⁸

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Footnotes

¹ [Turner v. Selectmen of Hebron](#), 61 Conn. 175, 22 A. 951 (1891).
Riparian rights are special rights pertaining to the use of water in a waterway adjoining the owner's property, and may include fishing among other uses. [Kranz v. Meyers Subdivision Property Owners Ass'n, Inc.](#), 969 N.E.2d 1068 (Ind. Ct. App. 2012), decision clarified on reh'g, 973 N.E.2d 615 (Ind. Ct. App. 2012).
The owner of uplands on a tidal, navigable waterway possesses riparian rights, consisting of the right to reasonable access to the water for uses including fishing. [Kearns v. Thilburg](#), 76 A.D.3d 705, 907 N.Y.S.2d 310 (2d Dep't 2010).
As to the definition and nature of riparian rights, generally, see [Am. Jur. 2d, Waters](#) §§ 33 to 54.

² [§ 30](#).

³ § 14.

⁴ Lehigh Falls Fishing Club v. Andrejewski, 1999 PA Super 184, 735 A.2d 718 (1999); State v. Head, 330 S.C. 79, 498 S.E.2d 389 (Ct. App. 1997).

⁵ Michigan United Conservation Clubs v. Board of Trustees of Michigan State University, 172 Mich. App. 189, 431 N.W.2d 217, 50 Ed. Law Rep. 161 (1988).

⁶ Millspaugh v. Northern Indiana Public Service Co., 104 Ind. App. 540, 12 N.E.2d 396 (1938) (overruled in part on other grounds by, Fort Wayne Nat. Bank v. Doctor, 149 Ind. App. 365, 272 N.E.2d 876 (1971)).

⁷ Herrin v. Sutherland, 74 Mont. 587, 241 P. 328, 42 A.L.R. 937 (1925).

⁸ Albright v. Cortright, 64 N.J.L. 330, 45 A. 634 (N.J. Ct. Err. & App. 1900).

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II. Hunting and Fishing Rights

A. Overview

2. In or on Private Lands and Waters

§ 22. Right of fishery of riparian owners—Limitations on right

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fish](#) 3, 5(.5) to 5(2)

West's Key Number Digest, [Water Law](#) 1242

While a riparian owner has the exclusive right of fishery upon his or her own land, he or she must so exercise that right as not to injure others in the enjoyment of a right upon their lands, either above or below his or hers.¹ He or she is not permitted to wantonly destroy fish passing through the water over his or her land,² or to pollute the water to the injury of the fishing rights of a lower proprietor.³ Another limitation on the riparian owner's rights is the power of regulation which the state may exercise over the taking of fish in either private or public waters.⁴

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Footnotes

¹ [Griffith v. Holman](#), 23 Wash. 347, 63 P. 239 (1900).

² [State v. Haskell](#), 84 Vt. 429, 79 A. 852 (1911).

³ [Reese v. Qualtrough](#), 48 Utah 23, 156 P. 955, 14 A.L.R. 94 (1916).

⁴ §§ 21, 30.

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II. Hunting and Fishing Rights


A. Overview

2. In or on Private Lands and Waters

§ 23. Acquisition of hunting or fishing rights in premises of others

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West's Key Number Digest

West's Key Number Digest, [Fish](#)  3, 5(.5) to 5(2)

West's Key Number Digest, [Game](#)  2.5, 3

Forms

[Am. Jur. Legal Forms 2d §§ 118:4 to 118:28](#) (Forms pertaining to fish and game leases)

A right to hunt on the premises of another or to fish in the private waters of another may be acquired by a grant or lease from the owner.¹ An owner of lands may convey exclusive hunting rights thereon to others so as to bar the owner from hunting on his or her own premises.² Conversely, an owner may convey his or her premises and reserve hunting or fishing rights for the owner, his or her heirs, or assigns.³

The right to take fish from the private waters of another may be acquired by prescription through hostile and exclusive occupancy for the statutory period.⁴ Each claimant to a prescriptive right must acquire it for himself or herself; and since certainty of the person is necessary to the validity of a grant or acquisition by prescription, presupposing a grant, the public, as such, cannot secure the right to fish in the waters by virtue of the acts of some of its members in taking fish therefrom for a long period of time;⁵ nor can the public in general acquire the right by dedication, condemnation, or legislative act.⁶ However, a conservation easement may grant hunting rights to a state Department of Fish and Game.⁷

The right to fish in private waters⁸ or to hunt on the premises of another⁹ is a property right. It is an interest in real estate in the nature of an incorporeal hereditament,¹⁰ and is classified as a profit a prendre¹¹ which, unless the grant otherwise determines the rights of the parties, the owner may assign¹² and which may be inherited by his or her heirs.¹³ As an interest in real estate, a right to fish and hunt is one which requires a writing for its creation.¹⁴ Accordingly, a defendant's claim that he had an easement by prescription did not preclude his conviction for hunting without permission where there was no evidence

that the defendant or any member of his family had an easement by prescription concerning the owner's property, and even if the owner gave the defendant verbal permission to pursue a wounded deer onto the owner's property, the pertinent statute required written permission for one to hunt on another's land.¹⁵

The grant of a right to hunt over land must be strictly construed, and cannot be extended beyond the terms of the deed¹⁶ and where such a grant is clear and not ambiguous, extraneous circumstances may not be introduced to explain or vary it;¹⁷ nor can the grantee of the premises, where the grantor has reserved the hunting privileges, permit others to come on the land and hunt, although the grantee, or his or her assigns, have a qualified right to hunt which is subject to the fee of hunting privileges reserved to the grantor.¹⁸

In the absence of anything to the contrary in a grant of hunting or fowling privileges, the right to hunt and fowl is limited to the usual and reasonable methods generally used in the vicinity at the time of the execution of the grant, and the grantor is under no obligation to maintain a preserve for the pleasure and sport of the grantee, but the latter must exercise the right in the condition it may be at the time of the grant.¹⁹ The grantor is not liable for depreciation in the value of such rights from his or her acts in clearing and draining the land, provided he or she does so in good faith for the purpose of improving it.²⁰ Although a reservation of recreational rights in the deed, which amounted to hunting rights, survived a conveyance from the original grantee to the subsequent owner, the reservation did not limit the owner's use of the affected land and therefore, absent malicious bad faith destruction of hunting rights, the owner was not liable to the grantor for damages to those rights which resulted from clear-cutting timber from the land.²¹

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Footnotes

- ¹ [Figliuzzi v. Carcajou Shooting Club of Lake Koshkonong](#), 184 Wis. 2d 572, 516 N.W.2d 410 (1994).
- ² [St. Helen Shooting Club v. Mogle](#), 234 Mich. 60, 207 N.W. 915 (1926); [Council v. Sanderlin](#), 183 N.C. 253, 111 S.E. 365, 32 A.L.R. 1527 (1922).
- ³ [Bosworth v. Nelson](#), 170 Ga. 279, 152 S.E. 575 (1930); [Council v. Sanderlin](#), 183 N.C. 253, 111 S.E. 365, 32 A.L.R. 1527 (1922).
- ⁴ [Bosworth v. Nelson](#), 170 Ga. 279, 152 S.E. 575 (1930); [Millsbaugh v. Northern Indiana Public Service Co.](#), 104 Ind. App. 540, 12 N.E.2d 396 (1938) (overruled in part on other grounds by, [Fort Wayne Nat. Bank v. Doctor](#), 149 Ind. App. 365, 272 N.E.2d 876 (1971)).
- ⁵ [Bosworth v. Nelson](#), 170 Ga. 279, 152 S.E. 575 (1930).
- ⁶ [Millsbaugh v. Northern Indiana Public Service Co.](#), 104 Ind. App. 540, 12 N.E.2d 396 (1938) (overruled in part on other grounds by, [Fort Wayne Nat. Bank v. Doctor](#), 149 Ind. App. 365, 272 N.E.2d 876 (1971)).
A warranty easement deed granted by a plantation to the United States, which deed placed a pond on the plantation's property into the Federal Wetlands Reserve Program in exchange for around \$1.5 million, did not put the pond or its wildlife into the public domain, where the pond was not a navigable waterway and the deed specifically and unambiguously reserved to the plantation the sole "right to prevent trespass and to control access by the general public." [Johnson v. De Kros](#), 2014 Ark. App. 254, 435 S.W.3d 19 (2014).
- ⁷ [Wooster v. Department of Fish & Game](#), 211 Cal. App. 4th 1020, 151 Cal. Rptr. 3d 340 (3d Dist. 2012).
- ⁸ [State v. Leavitt](#), 105 Me. 76, 72 A. 875 (1909).
- ⁹ [Hanson v. Fergus Falls Nat. Bank](#), 242 Minn. 498, 65 N.W.2d 857, 49 A.L.R.2d 1379 (1954).
- ¹⁰ [Hume v. Rogue River Packing Co.](#), 51 Or. 237, 92 P. 1065 (1907).
- ¹¹ [Hanson v. Fergus Falls Nat. Bank](#), 242 Minn. 498, 65 N.W.2d 857, 49 A.L.R.2d 1379 (1954).
- ¹² [Miller v. Lutheran Conference & Camp Ass'n](#), 331 Pa. 241, 200 A. 646, 130 A.L.R. 1245 (1938); [Anderson v. Gipson](#),

144 S.W.2d 948 (Tex. Civ. App. Galveston 1940).

13 Bosworth v. Nelson, 170 Ga. 279, 152 S.E. 575 (1930); St. Helen Shooting Club v. Mogle, 234 Mich. 60, 207 N.W. 915 (1926).

14 Hanson v. Fergus Falls Nat. Bank, 242 Minn. 498, 65 N.W.2d 857, 49 A.L.R.2d 1379 (1954).

15 Div. of Wildlife v. Freed, 101 Ohio App. 3d 709, 656 N.E.2d 694 (3d Dist. Hancock County 1995).

16 Isherwood v. Salene, 61 Or. 572, 123 P. 49 (1912).

17 Council v. Sanderlin, 183 N.C. 253, 111 S.E. 365, 32 A.L.R. 1527 (1922).

18 Council v. Sanderlin, 183 N.C. 253, 111 S.E. 365, 32 A.L.R. 1527 (1922).

19 St. Helen Shooting Club v. Mogle, 234 Mich. 60, 207 N.W. 915 (1926).

20 Isherwood v. Salene, 61 Or. 572, 123 P. 49 (1912).

21 Mikesch v. Peters, 284 N.W.2d 215 (Iowa 1979).
As to injury to hunting and fishing rights, generally, see §§ 24 to 26.

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II. Hunting and Fishing Rights

B. Injury to Hunting and Fishing Rights

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Research References

West's Key Number Digest

West's Key Number Digest, [Fish](#) 🔑5(3), 6, 7(3)

West's Key Number Digest, [Game](#) 🔑1, 4

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A.L.R. Index, Fish and Game

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West's A.L.R. Digest, [Game](#) 🔑1, 4

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II. Hunting and Fishing Rights


B. Injury to Hunting and Fishing Rights

1. In General

§ 24. Injury to hunting and fishing rights, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fish](#)  5(3), 6, 7(3)

West's Key Number Digest, [Game](#)  1, 4

The exclusive right to fish at a certain place, in either public or private waters, is a property right,¹ and an injury to such a right is actionable.² There is no right of action based directly on an injury to the fish in the waters, since until they are reduced to actual possession they belong to the state and not to the owner of the fishery.³ Thus, if one pollutes the water, the proprietor cannot recover the value of the fish thereby killed, but he or she may recover for the injuries to his or her fishing rights,⁴ and the operator of a fish hatchery can recover damages for the loss of fish because of the pollution of the waters of a creek feeding the hatchery.⁵ Accordingly, in an action for damages for the pollution of a stream, although the plaintiff had no title in fish in the stream until they were caught, evidence was admissible to show that since the operation of the coal washer which was alleged to have been the source of the pollution the fish had decreased in the stream, the plaintiff's catch had diminished, and dead fish were discovered in the stream.⁶

A landowner has a qualified property in wild animals, enforceable as a civil right, and may maintain an action at law against a trespasser for the taking of such animals from his or her land.⁷

The state is deemed to be the trustee of wildlife for all citizens and has the obligation to bring suit not only to protect the corpus but also to recoup the public's loss occasioned by negligent acts of those who damage the property.⁸

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Footnotes

¹ [§ 23.](#)

² [Griffith v. Holman](#), 23 Wash. 347, 63 P. 239 (1900).

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³ § 3.

⁴ *Masonite Corp. v. Steede*, 198 Miss. 530, 23 So. 2d 756 (1945).

⁵ *Bales v. City of Tacoma*, 172 Wash. 494, 20 P.2d 860 (1933).

⁶ *Tutwiler Coal, Coke & Iron Co. v. Nichols*, 145 Ala. 666, 146 Ala. 364, 39 So. 762 (1905).

⁷ *McKee v. Gratz*, 260 U.S. 127, 43 S. Ct. 16, 67 L. Ed. 167 (1922); *Herrin v. Sutherland*, 74 Mont. 587, 241 P. 328, 42 A.L.R. 937 (1925).

⁸ *State v. City of Bowling Green*, 38 Ohio St. 2d 281, 67 Ohio Op. 2d 349, 313 N.E.2d 409 (1974).

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II. Hunting and Fishing Rights


B. Injury to Hunting and Fishing Rights

1. In General

§ 25. Injury to right to take shellfish

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fish](#)  5(3), 6, 7(3)

The owner of an oyster bed, provided he or she has acquired the bed in compliance with the terms of a statute permitting the acquisition of such a right, may maintain an action against individuals and private or quasi-public corporations for damages to such oyster bed occasioned by pollution of the waters¹ or the grounding of a vessel,² and where oysters are taken from such a bed by trespassers, or where other shellfish are taken from private waters by trespassers, an action may be maintained for their conversion.³ A license granted by a department of public works expressly providing that it should not be construed so as to impair the legal rights of any person is no defense to an action against a dredging contractor for loss of lobsters asphyxiated by silt raised in a dredging operation.⁴

A person suing for damages to his or her shellfish beds must show title thereto by a preponderance of the evidence where the title is in issue. In such a case, evidence of possession under a claim of right not disputed by anyone claiming to have a better or other title is sufficient proof of title.⁵

Under a state's natural resource laws, an action to remedy environmental damage to oyster beds may be brought by the state's department of wildlife and fisheries.⁶

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Footnotes

¹ [Payne & Butler v. Providence Gas Co.](#), 31 R.I. 295, 77 A. 145 (1910) (wherein a private gas manufacturing company was held liable for an injury to private oyster beds in waters, held under lease from the state, resulting from the discharge into such waters of deleterious by-products).

² [Melerine v. Tom's Marine & Salvage, LLC](#), 2019-672 La. App. 4 Cir. 3/4/20, 2020 WL 1056806 (La. Ct. App. 4th Cir. 2020), writ granted, 303 So. 3d 313 (La. 2020).

³ Gratz v. McKee, 270 F. 713, 23 A.L.R. 1393 (C.C.A. 8th Cir. 1920), *aff'd*, 260 U.S. 127, 43 S. Ct. 16, 67 L. Ed. 167 (1922).

⁴ Bay State Lobster Co. v. Perini Corp., 355 Mass. 794, 245 N.E.2d 759 (1969).

⁵ Payne & Butler v. Providence Gas Co., 31 R.I. 295, 77 A. 145 (1910).

⁶ State, Dept. of Wildlife and Fisheries v. Gulfport Energy Corp., 125 So. 3d 468 (La. Ct. App. 3d Cir. 2012).

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35A Am. Jur. 2d Fish, Game, and Wildlife Conservation § 26

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Fish, Game, and Wildlife Conservation
Karl Oakes, J.D.

II. Hunting and Fishing Rights

B. Injury to Hunting and Fishing Rights

1. In General

§ 26. Conflict between fishing rights and navigation; unnecessary injury to fishery from navigation

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fish](#)  5(3), 6, 7(3)

A common right of fishery in public waters is held and enjoyed subject to the right of navigation.¹ The reason for the superiority of the right of navigation may be found in the circumstance that the piscatorial rights in the water may, as a general proposition, be exercised at numerous places in the water, but navigation is generally confined to certain definite localities. The mutual adjustment of the two rights in order that both may be reasonably enjoyed, therefore, requires that in the places available for navigation, the fishing rights be secondary.² Another reason is found in the greater public benefit derived from the navigation.³

While the right of navigation in navigable waters is paramount to that of fishing, it is not exclusive, and navigators cannot be indifferent to the rights of fishermen. The right of navigation limits the right of fishery only insofar as it interferes with the fair, useful, and legitimate exercise of the right of navigation.⁴ The public easement of navigation in navigable-in-fact rivers does not sweep away or displace other rights accompanying private ownership of the bed of a navigable-in-fact river, including that of exclusive fishery.⁵ Navigators who unnecessarily, designedly, or negligently run their boats or cast their anchors into nets, seines, or other fishing apparatus may be held liable for the injury.⁶

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Footnotes

¹ [Winous Point Shooting Club v. Slaughterbeck](#), 96 Ohio St. 139, 117 N.E. 162 (1917); [Anderson v. Columbia Contract Co.](#), 94 Or. 171, 184 P. 240, 7 A.L.R. 653 (1919).

² [Winous Point Shooting Club v. Slaughterbeck](#), 96 Ohio St. 139, 117 N.E. 162 (1917).

³ [Anderson v. Columbia Contract Co.](#), 94 Or. 171, 184 P. 240, 7 A.L.R. 653 (1919).

⁴ [Anderson v. Columbia Contract Co.](#), 94 Or. 171, 184 P. 240, 7 A.L.R. 653 (1919).

⁵ [Douglaston Manor, Inc. v. Bahrakis](#), 89 N.Y.2d 472, 655 N.Y.S.2d 745, 678 N.E.2d 201 (1997).

⁶ [Anderson v. Columbia Contract Co.](#), 94 Or. 171, 184 P. 240, 7 A.L.R. 653 (1919).

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II. Hunting and Fishing Rights

B. Injury to Hunting and Fishing Rights

2. Remedies

§ 27. Trespass as remedy for injury to hunting or fishing rights

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fish](#) 5(3), 6, 7(3)

West's Key Number Digest, [Game](#) 1, 4

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[Entry on private lands in pursuit of wounded game as criminal trespass, 41 A.L.R.4th 805](#)

Forms

[Am. Jur. Pleading and Practice Forms, Fish and Game § 5](#) (Complaint, petition, or declaration—Injury to shellfish caused by industrial pollution of public waters)

[Am. Jur. Pleading and Practice Forms, Fish and Game § 9](#) (Complaint, petition, or declaration—To enjoin trespassing for fishing)

[Am. Jur. Pleading and Practice Forms, Fish and Game § 42](#) (Complaint, petition, or declaration—To enjoin trespasses substantially destroying value of game preserve)

An action for damages will lie for any intrusion upon private property for the purpose of hunting; such a trespasser commits a wrong against the owner, who has a remedy for nominal damages even if no other injury is shown.¹ A tenant in possession of the premises who has the right to exercise the hunting privileges thereon has sufficient legal title to maintain an action against a trespasser,² and the grantee of hunting rights is also entitled to maintain an action against a trespasser.³ Shooting across private land without authorization may constitute trespass, even if the target was a decoy deployed by law enforcement in an

effort to curb poaching.⁴

If a person's fishery rights are wrongfully invaded or interfered with by another, he or she may maintain an action of trespass or similar remedy in tort for any injury suffered thereby.⁵ Thus, trespass will also lie for the pollution of the waters of an exclusive fishery by another.⁶ If one person enters the private property of another and takes fish from waters where the owner has an exclusive right to catch them, he or she is guilty of a trespass.⁷ Under the view that a riparian owner who has title to the stream has a qualified right of ownership in the fish therein,⁸ the person against whom the trespass is committed may recover the value of the fish taken as of the time of conversion.⁹

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Footnotes

- ¹ Swan Island Club v. Ansell, 51 F.2d 337 (C.C.A. 4th Cir. 1931).
- ² Diana Shooting Club v. Lamoreaux, 114 Wis. 44, 89 N.W. 880 (1902).
- ³ Council v. Sanderlin, 183 N.C. 253, 111 S.E. 365, 32 A.L.R. 1527 (1922).
- ⁴ State v. Wilkinson, 724 So. 2d 614 (Fla. 5th DCA 1998).
- ⁵ Griffith v. Holman, 23 Wash. 347, 63 P. 239 (1900).
- ⁶ Hodges v. Pine Product Co., 135 Ga. 134, 68 S.E. 1107 (1910).
- ⁷ Herrin v. Sutherland, 74 Mont. 587, 241 P. 328, 42 A.L.R. 937 (1925).
- ⁸ § 21.
- ⁹ McKee v. Gratz, 260 U.S. 127, 43 S. Ct. 16, 67 L. Ed. 167 (1922).

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II. Hunting and Fishing Rights

B. Injury to Hunting and Fishing Rights

2. Remedies

§ 28. Recovery of economic loss as remedy for injury to hunting or fishing rights

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fish](#) 5(3), 6, 7(3)

West's Key Number Digest, [Game](#) 1, 4

Generally maritime law bars recovery for purely economic losses in the absence of compensable injury to personal property.¹ However, notwithstanding the general federal maritime law rule that there can be no recovery for economic losses in the absence of compensable injury to personal property, commercial fisherman may recover purely economic losses, even in strict-liability suits.² Thus, commercial fishermen may recover for pure economic harm resulting from negligent acts that affect fishing waters,³ although such an exception is a narrow one.⁴ Even if there is an exception for commercial fishermen from general maritime law barring claims for purely economic losses sounding in tort, seafood dealers claiming damages from an oil spill are not “fishermen” entitled to invoke the exception.⁵

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Footnotes

- ¹ [Ballard Shipping Co. v. Beach Shellfish](#), 32 F.3d 623 (1st Cir. 1994); [Slaven v. BP America, Inc.](#), 786 F. Supp. 853 (C.D. Cal. 1992).
- ² [Slaven v. BP America, Inc.](#), 786 F. Supp. 853 (C.D. Cal. 1992); [Blue Gulf Seafood, Inc. v. TransTexas Gas Corp.](#), 24 F. Supp. 2d 732 (S.D. Tex. 1998), *aff'd in part*, 244 F.3d 135 (5th Cir. 2000).
- ³ [Blue Gulf Seafood, Inc. v. TransTexas Gas Corp.](#), 24 F. Supp. 2d 732 (S.D. Tex. 1998), *aff'd in part*, 244 F.3d 135 (5th Cir. 2000).
- ⁴ [Golnoy Barge Co. v. M/T Shinoussa](#), 841 F. Supp. 783 (S.D. Tex. 1993).
- ⁵ [Complaint of Ballard Shipping Co.](#), 810 F. Supp. 359 (D.R.I. 1993), decision *aff'd in part*, *rev'd in part* on other

grounds, [32 F.3d 623 \(1st Cir. 1994\)](#).

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II. Hunting and Fishing Rights


B. Injury to Hunting and Fishing Rights

2. Remedies

§ 29. Injunction as remedy for injury to hunting or fishing rights

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fish](#)  5(3), 6, 7(3)

West's Key Number Digest, [Game](#)  1, 4

The damages recoverable in trespass by one having an exclusive fishery in certain waters against an intruder who takes fish therefrom are usually slight; and if the trespasses are continued, the proprietor has no adequate remedy at law. Under such circumstances, he or she is permitted to maintain an action in equity to restrain the trespasses.¹ The qualified property *ratione soli* to fish is such as will sustain an action by the landowner for an injunction to restrain invasions of it.² Furthermore, the jurisdiction of equity extends under a proper condition of facts to suits to restrain interference with oyster beds.³ In like manner, where one or more persons continually violate or threaten to violate a landowner's rights, there is such a failure of a remedy at law that the equitable jurisdiction of the court may be invoked and further trespasses enjoined.⁴ Accordingly, the shooting of guns over another's lands so as to cause considerable damage and impair the value of the landowner's shooting privileges is a wrong which may be restrained by injunction.⁵

The grantee of hunting rights, however, may not maintain an action for an injunction against his or her grantor for maliciously destroying such hunting rights, but must seek his or her remedy in an action at law, since damages at law are adequate.⁶

If a member of the public is denied his or her common right to hunt on public waters, the interference with his or her right may be enjoined.⁷

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Footnotes

¹ [Saginaw Lumber & Salt Co. v. Griffore](#), 145 Mich. 287, 108 N.W. 681 (1906).

² [Dennig v. Graham](#), 227 Mo. App. 717, 59 S.W.2d 699 (1933).

³ [Cain v. Simonson](#), 39 So. 571 (Ala. 1905).

⁴ [Johnson v. Burghorn](#), 212 Mich. 19, 179 N.W. 225, 11 A.L.R. 234 (1920) (an injunction is the proper remedy to prevent trapping on submerged lands of a riparian owner); [Council v. Sanderlin](#), 183 N.C. 253, 111 S.E. 365, 32 A.L.R. 1527 (1922).

⁵ [Whittaker v. Stangvick](#), 100 Minn. 386, 111 N.W. 295 (1907).

⁶ [Isherwood v. Salene](#), 61 Or. 572, 123 P. 49 (1912).

⁷ [Red Canyon Sheep Co. v. Ickes](#), 98 F.2d 308 (App. D.C. 1938).

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